ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	WT Docket No. 97-199
	)	
WESTEL SAMOA, INC.	)	File No. 00560-CW-L-96
For Broadband Block C Personal	)	
Communications Systems Facilities	)	
	)	
and	)	
	)	
WESTEL, L.P.	)	File Nos. 00129-CW-L-97
	)	00862-CW-L-97
For Broadband Block F Personal	)	00863-CW-L-97
Communications Systems Facilities	)	00864-CW-L-97
	)	00865-CW-L-97
	)	00866-CW-L-97

To: Administrative Law Judge
Arthur I. Steinberg

RESPONSE BY CLEARCOMM, L.P., TO
ANTHONY T. EASTON'S MOTION FOR PROTECTIVE ORDER

ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, L.P., by its attorneys and pursuant to Section 1.315(b)(2) of the Commission's rules, hereby files this response[1] in opposition to Anthony T. Easton's request for a protective order to either prohibit the Wireless Telecommunications Bureau ("Bureau") from deposing Mr. Easton or restrict the Bureau's examination to matters relevant to Issue 2(A) of the Hearing Designation Order ("HDO") in this

[1] This response assumes that Mr. Easton's opposition was due, as he argues, on November 3 since under the Commission's rules, parties have 14 days after "service of the notice to take depositions" to file a response. 47 C.F.R. § 1.315(b)(2). If the service date is deemed to be October 29, of course, then Mr. Easton's motion should be dismissed without consideration because he has stated no cause for a late filing other than that "the undersigned may have erred in his interpretation of 'service' for the purposes of" the Commission's discovery rules.

proceeding.[2] The Presiding Officer should deny Mr. Easton's motion because part of the subject matter of the deposition -- Mr. Easton's conduct over a period of a few weeks in making misrepresentations to the Commission, his apparent destruction of documents relating to those misrepresentations, and his related communications with Mr. Quentin L. Breen and others affiliated with PCS 2000 -- is at the very core of these proceedings. That conduct falls squarely within the broad scope of discovery permitted by Section 1.311 of the Commission's Rules. Moreover, Mr. Easton has failed to satisfy his burden of establishing that, under the circumstances of this case, the proposed deposition would be oppressive under Section 1.313, which governs the issuance of protective orders.

Argument

I. The Proposed Examination of Mr. Easton Is Well Within the Scope of Section 1.311.

Section 1.311 of the Commission's Rules, governing discovery, is modeled in material parts on Rule 26 of the Federal Rules of Civil Procedure, which courts have consistently interpreted to permit broad discovery of parties and nonparties.[3] Like Rule 26, Section 1.311 provides that "[p]ersons and parties may be examined regarding any matter, not privileged,

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[2] *Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause*, __ FCC Rcd __, FCC 97-322 (Sept. 9. 1997). On November 13, 1997, ClearComm filed a petition to intervene in this proceeding. Under Section 1.1202(d) of the Commission's rules, ClearComm is deemed to be a party at least until this petition is acted upon. 47 C.F.R. § 1.1202(d).

[3] *See, e.g., Carter Products v. Eversharp*, 360 F.2d 868, 872 (7th Cir. 1966)("The framers of the Federal Rules provided liberal discovery . . . concluding that any inconvenience to third parties . . . is generally outweighed in the public interest . . .."); *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978)(Rule 26 "has been construed broadly to encompass any matter that bears on, or could lead to other matter that could bear on, any issue that is or may be in the case.")

which is relevant to the hearing issues."[4] Moreover, under Rule 26 and Section 1.311, so long as the "testimony sought appears reasonably calculated to lead to the discovery of admissible evidence," the assertion that the testimony will not be admissible at the hearing "is not ground for objection."[5] Like the discovery provisions of the Federal Rules of Civil Procedure, the Commission's "discovery rules should be accorded broad treatment."[6] As such, "the Commission's discovery rules accord parties broad latitude in questioning witnesses during prehearing discovery."[7]

The proposed topics for Mr. Easton's deposition are well within the broad boundaries stated in Section 1.311. As the HDO makes clear, the conduct by Mr. Easton in attempting to deceive the Commission and his apparent destruction of evidence is at the heart of this proceeding. Although the issue of how much of that conduct the Bureau must prove in this hearing has been raised, at present, that issue is not finally decided.[8] His testimony about that conduct therefore remains directly relevant to one or more of those core issues.

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4 47 C.F.R. § 1.311(b).

5 Id.

6 *Rules and Policies to Facilitate Public Participation and Reregulation of the Various Communications Industries in the Public Interest*, 61 F.C.C.2d 1112, 1126 (1976).

7 *Applications of Gross Telecasting, Inc.*, 48 F.C.C.2d 128, 130 (1974), *recon. denied*, 50 F.C.C.2d. 630 (1975).

8 At the October 15 pre-hearing conference, counsel for the Bureau asked the following:

> [T]he issue [ ] couched against Mr. Breen and Westel deal[ing] with Mr. Breen's knowledge of any misrepresentations that took place and actions he took thereafter, is, of course, based on the premise that actually misrepresentations took place.
>
> [In] that regard, are you taking it as a given that misrepresentations took place, or

(Continued...)

Regardless of whether Mr. Easton's conduct must be established by evidence at the hearing, however, deposition examination about that conduct is well within the scope of Section 1.311. Issue 2(A) of the HDO, to which Mr. Easton mistakenly points as limiting examination about his conduct, by itself justifies full examination of Mr. Easton under Section 1.311. In articulating Issue 2(A), the Commission directed the Presiding Officer "[t]o determine the facts and circumstances surrounding the conduct of Quentin L. Breen in connection with PCS 2000's bids placed on January 23, 1996." As the HDO recognizes, Messrs. Breen and Easton were both principals of the former sole general partner of PCS 2000.[9] Mr. Easton and Mr. Breen were also two of the bidding agents for PCS 2000 in the bidding for broadband PCS C Block licenses.[10] It is therefore appropriate to examine Mr. Easton about his communications with Mr. Breen concerning the bidding process. That examination, which concerns what Mr. Breen knew and when he knew it, cannot be conducted without questions directed to what Mr. Easton did, when he did it and when and what he told others, including Mr. Breen, about his actions. All of Mr. Easton's conduct, including his communications with the Commission and his communications with Mr. Breen and other principals of the general partner of PCS 2000 are interrelated. As such, these communications are a central part of the res gestae of the incident – an incident that

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(...Continued)
are you wanting that to be proven and then to flow from that what actions and knowledge Mr. Breen thereafter?

In response, the Presiding Officer stated, "That's a real good question, and I don't know the answer to that because the hearing designation order seems to me to be conflicting in a certain respect". *Hearing Transcript* at 26.

9 HDO at ¶ 6.

10 HDO at ¶ 8.

occurred over a short period of time and involved both communications and actions. Examination of Mr. Easton regarding his underlying conduct is also relevant to evaluation of his credibility regarding his testimony about his conversations with Mr. Breen.

Moreover, Section 1.311 permits discovery of matters which might reasonably lead to admissible evidence, even if the matters themselves are not admissible. Examination of Mr. Breen regarding his underlying conduct might well lead to identification of documents and other witnesses that may provide additional information regarding Mr. Breen's knowledge and intentions. In addition, examination of Mr. Easton is necessary in order to evaluate the testimony of other witnesses on these subjects.

II. Mr. Easton Has Failed to Set Forth Facts Which Would Support Issuance of a Protective Order Under Section 1.313.

Although Mr. Easton raises in his request for a protective order some arguments regarding the appropriateness of the deposition under Section 1.311, his motion appears primarily to assert that a protective order is necessary to protect him from "conduct that has become oppressive."[11] Mr. Easton raises three issues in an attempt to justify his request for a protective order. He argues that his nonparty status, the Bureau's prior opportunity to depose him, and the purpose of the deposition make the Bureau's Motion to depose him oppressive. Each of these grounds is without merit.

Mr. Easton's request for protective order based in part on his nonparty status is contrary to the face of Section 1.311 itself, and its companion Rule 26 of the Federal Rules of Civil

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[11] Motion at 3-4.

Procedure. Section 1.311 specifically applies to "[p]ersons and parties."[12] That the provision for depositions is not limited to parties is reinforced by other prehearing provisions of the Commission's rules. Section 1.313, which governs protective orders, contains no provision for the issuance of an order based solely on the deponent's status as a nonparty. Similarly, the use of a subpoena under Section 1.318(b) to compel the attendance of witnesses at depositions, pursuant to Sections 1.331 through 1.340, is not limited to party witnesses. Indeed, Section 1.333(b) of the Commission's rules specifically contemplates subpoenas directed to non-parties.

The two cases cited by Mr. Easton,[13] though involving nonparty witnesses, each turns on special circumstances that justified the use of a protective order. Absent such special circumstances, which Mr. Easton's nonparty status does not itself create, a protective order should not issue.[14]

Mr. Easton also argues that the Presiding Officer should consider the fact that the Bureau had ample prior opportunity to depose him and, therefore should not have the opportunity to do so now.[15] However, the fact that the Bureau had an opportunity to depose Mr. Easton earlier "does not of itself demonstrate good cause or undue burden" sufficient to issue a protective

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12 47 C.F.R. § 1.1311 (emphasis added).

13 *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422 (Fed. Cir. 1993)(special circumstances included need to protect proprietary information); *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646 (9th Cir. 1980)(special circumstances included release from all legal claims).

14 *American Telephone & Telegraph Co. and Assoc. Bell Sys. Cos.*, 29 Rad. Reg. 2d (P&F) 886 (ALJ 1974) (noting that nonparty status is not a barrier to discovery); *Applications of Florida-Georgia Television Co., et. al.*, 19 F.C.C.2d 525 (Rev. Bd. 1969) (rejecting nonparty status argument as a grounds to quash a discovery motion seeking relevant evidence).

15 Motion at 2.

order.[16] Indeed, Section 1.311 is to control discovery in connection with a hearing, which necessarily must occur after an investigation has been completed and a hearing designation order issued. Moreover, the fact that the Bureau already has conducted an investigation that involves some of the same witnesses in another matter is without consequence.[17]

Mr. Easton also argues that the Bureau is attempting to depose him in order to "put together a misrepresentation/lack of candor case."[18] Yet the Commission already designated Mr. Easton's alleged misconduct for hearing -- a determination that Mr. Easton has refused to acknowledge or participate in. Even assuming that Mr. Easton's deposition may be used in a collateral proceeding, that concern "is not a ground for refusing an examination."[19] There is no doubt that Mr. Easton has relevant information regarding the events surrounding PCS 2000's bid and Mr. Breen's conduct. Mr. Easton's efforts to distract the Presiding Officer from that central fact should not be countenanced.

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[16] *Sentry Insurance v. Shivers*, 164 F.R.D. 255, 257 (D. Kan. 1996). In fact, the Commission has found it to be proper to use facts uncovered in discovery in other proceedings. *See Amendment of Part I, Rules of Practice and Procedure to Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings*, 91 F.C.C.2d 527, 535 (1982) (discussing motions to enlarge and use of information unearthed in discovery).

[17] *See S.E.C. v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990) ("[T]here is no authority which suggests that it is appropriate to limit the SEC's right to take discovery based upon the extent of its previous investigation into the facts underlying this case.").

[18] Motion at 4.

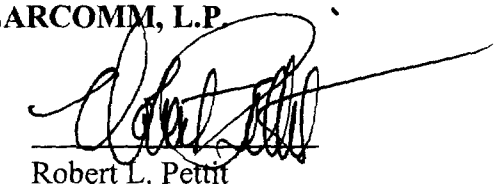
[19] *De Seversky v. Republic Aviation Corp.*, 2 F.R.D. 183, 185 (E.D.N.Y. 1941); *see also Deering Milliken Research Corp. v. Leesona Corp.* 27 F.R.D. 440, 441 (E.D.N.Y. 1961) ("settled law").

Conclusion

For the reasons stated in this memorandum, ClearComm respectively requests that the Presiding Officer deny the motion by Anthony T. Easton for a protective order.

Respectfully submitted,

CLEARCOMM, L.P.

By: 

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November 17, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1997, I caused copies of the foregoing "Opposition for Motion for Protective Order" to be hand-delivered to the following:

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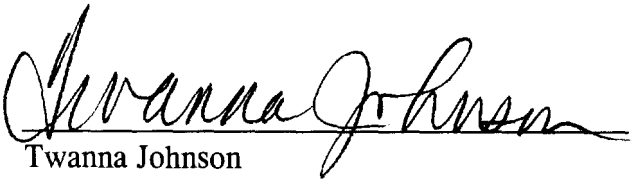

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